STATE OF MICHIGAN

COURT OF APPEALS

JAMES A. PATRICK, JR., and CARLA L. PATRICK,

Plaintiffs-Appellants,

v

LAUREL M. FLAUGHER, as Trustee of the DEWEY L. FLAUGHER AND LAUREL M. FLAUGHER TRUST, and TERRI STEWART,

Defendants-Cross-Plaintiffs-Appellees,

and

COLDWELL-BANKER SCHMIDT REALTORS – HOUGHTON LAKE and VAL WYSACK-CROSS,

Defendants-Cross-Defendants-Appellees,

and

KATHLEEN L. FLAUGHER, PETER STEWART, and JAMES W. FLAUGHER,

Defendants-Appellees.

UNPUBLISHED
February 24, 2015

No. 319782
Roscommon Circuit Court
LC No. 12-729939-CH

Before: RIORDAN, P.J., and MURPHY and BOONSTRA, JJ.

PER CURIAM.

Plaintiffs James A. Patrick, Jr., and Carla L. Patrick, husband and wife, appeal as of right the trial court's orders granting summary disposition in favor of defendants. Plaintiffs' lawsuit arose out of the execution of a purchase agreement for real property, which contemplated employment of a land contract at closing. Plaintiffs were the prospective purchasers and the prospective vendor was the Dewey L. Flaugher and Laurel M. Flaugher Trust (the trust), with Laurel M. Flaugher serving as the trustee. The closing did not come to fruition, and plaintiffs

filed suit, alleging numerous causes of action, including breach of contract, and seeking, in part, specific performance. We reverse and remand for further proceedings.

Dewey and Laurel Flaugher are husband and wife, and while they now reside in North Carolina, they previously lived in a home in Roscommon County, Michigan, which real property is the subject of this appeal (hereafter "the property"). Defendant Terri Stewart (Stewart) is the Flaugher's adult daughter, she is married to defendant Peter Stewart, and she executed the purchase agreement pursuant to a claimed power of attorney. Defendant James Flaugher is the Flaugher's adult son, and he is married to defendant Kathleen Flaugher. Defendant Coldwell-Banker Schmidt Realtors – Houghton Lake (CBSR) is a real estate agency doing business in Roscommon County, and defendant Val Wysack-Cross (the realtor) is a real estate agent employed by CBSR. The realtor was the listing agent for the property, and CBSR was the listing agency. The realtor acted as a dual agent, representing both the seller and plaintiffs. In 2012, plaintiff James Patrick, Jr. (Patrick), obtained a job transfer from Wyoming to Michigan, and plaintiffs therefore began searching for a new home in Michigan and showed an interest in the Flaughers' home. The realtor began working on hammering out an agreement between plaintiffs and the Flaughers. The realtor worked primarily with Patrick on the buyers' side and with Stewart and her husband on the seller trust's side.

On July 12, 2012, plaintiffs and Stewart executed a purchase agreement for the property. The realtor had prepared and witnessed the agreement, and Stewart signed the agreement as "POA for Laurel Flaugher," the trustee. The purchase agreement indicated that the sale would be consummated pursuant to a land contract, and the purchase agreement contained a sales price, a down payment amount, a dollar figure for the monthly installments, an earnest-money deposit amount, an interest rate, and it provided for a balloon payment after one year. Under the purchase agreement, a closing was to be scheduled as soon as possible, but no later than August 4, 2012. Under the heading of "SELLER'S ACCEPTANCE," the following was stated:

> THE ABOVE AGREEMENT is hereby accepted [the preceding language was typed and the following language was written in cursive:] Offer accepted. Sellers to review and approve land contract prior to closing.

The interpretation and application of this particular provision lies at the heart of the dispute between the parties. We shall refer to the provision as the "acceptance clause."

A standard land contract that was consistent with the terms of the purchase agreement was prepared and delivered by the title company. The realtor testified that Stewart and her husband had voiced some concerns, wishing to make sure that the land contract required plaintiffs to pay the taxes and homeowner's insurance, precluded plaintiffs from making changes to the real estate absent the trust's approval, required plaintiffs to maintain the property in as good a condition as currently existing, allowed inspections with notice, and required plaintiffs to act in accordance with local ordinances. The matter regarding payment of the taxes and insurance was the primary concern. The realtor testified that the proposed land contract satisfied all of the concerns expressed by Stewart and her husband.

Subsequently, issues and complaints regarding the procurement of homeowner's insurance, a problematic roof, the results of a home inspection, and Patrick's alleged contentious behavior led to ill-will between the sale's participants. Ultimately, however, plaintiffs obtained

insurance, accepted the property in its current condition, and were prepared to close on the sale according to the terms of the purchase agreement. But Stewart and the Flaughters were no longer interested in engaging in the transaction with plaintiffs. On the basis of claimed communications with the realtor, Stewart believed that the purchase agreement was merely a preliminary document that was not binding. The Flaughers' family attorney sat down with Stewart and James Flaugher, along with their spouses, in order to review the purchase agreement and land contract. In a letter dated July 30, 2012, from the Flaughers' family attorney to plaintiffs, the attorney stated that the "[t]rust will not be proceeding with the sale" for three primary reasons.[1] The first reason was that plaintiffs had not provided "any proof of [their] ability to obtain [sufficient] insurance and [had] not provided insurance binders for the sellers' review." The second reason given by the family attorney pertained to the acceptance clause, which the attorney described as allowing "the sellers to have an attorney review the terms and conditions of the sale." He asserted that upon his review, he concluded that the terms of the purchase agreement were "completely unacceptable." The family attorney maintained that "[t]he down payment [was] far too small for a home of [its] value," and he complained that the purchase agreement called "for interest only payments during the life of the" agreement. The third reason, and what the family attorney deemed to be his "most important point," was that the house was held by the trust and that only the trustee (Laurel Flaugher) had the authority to sign a valid purchase agreement. Consequently, according to the family attorney, Stewart's signature had "no legal effect." No closing occurred, and subsequently the litigation was commenced.

In a second amended complaint, plaintiffs alleged that they were prepared to close on the sale, but defendants gave notice of their intent not to proceed and honor the purchase agreement, so no closing was held. Plaintiffs claimed that they had performed all of the conditions of the purchase agreement and were ready to receive a land contract. Plaintiffs alleged numerous counts, sounding in specific performance, breach of contract, promissory estoppel, fraud and misrepresentation, breach of fiduciary duties, wrongful and malicious conduct, violations of the Michigan Consumer Protection Act (MCPA), MCL 445.901 *et seq.*, a violation of the Elliott-Larsen Civil Rights Act (CRA), MCL 37.2101 *et seq.*, and civil conspiracy. The trustee and Stewart filed a cross-claim against CBSR and the realtor, alleging that CBSR and the realtor represented them during the real estate transaction, creating a fiduciary relationship, that CBSR and the realtor had communicated to them that the purchase agreement was not a binding contract, and that CBSR and the realtor advised the trustee and Stewart that the proposed land contract would only become binding if the trust's legal counsel approved all of the terms and conditions of the land contract. The cross-claim provided that should plaintiffs succeed in their lawsuit, the court should find that CBSR and the realtor breached their fiduciary duties.

CBSR and the realtor filed a motion for partial summary disposition under MCR 2.116(C)(8), arguing that plaintiffs' MCPA and CRA claims failed as a matter of law. The trial court granted the motion for summary disposition, and that ruling is not being challenged on appeal. Subsequently, plaintiffs filed a motion for partial summary disposition pursuant to MCR 2.116(C)(10) with respect to the specific performance and breach of contract counts in their complaint, arguing that there was no genuine issue of material fact that the trust/trustee and

[1] The title company was informed on July 30, 2012, that the closing was canceled.

Stewart had breached the purchase agreement and that plaintiffs were entitled to specific performance of the agreement, i.e., a court-ordered execution of the land contract. Plaintiffs relied on arguments and documentary evidence suggesting that the trustee and Stewart simply wanted out of what was viewed as a bad deal, absent a sound legal basis. In a response brief to plaintiffs' motion for summary disposition, the trustee and Stewart stated that the family attorney had in fact reviewed the proposed land contract and that the attorney opined "that the land contract was a bad deal because, among other matters, the down payment called for was wholly inadequate given the value of the subject property." The trustee and Stewart further argued that Stewart accepted plaintiffs' offer conditioned upon approval of the land contract and that the conditional acceptance was not restricted to certain terms of the land contract. Rather, the acceptance clause unambiguously allowed for review and approval of all the terms in the land contract, even those already contained in the purchase agreement. They argued that if the trial court agreed with this construction of the acceptance clause, they were entitled to summary disposition under MCR 2.116(I)(2), and not plaintiffs.[2] CBSR and the realtor filed a separate response to plaintiffs' motion for summary disposition, arguing that the specific performance and breach of contract counts did not pertain, nor were relevant, to them and should be summarily dismissed.

The trial court denied plaintiffs' motion for partial summary disposition with respect to the specific performance and breach of contract counts, and instead granted summary disposition in favor of defendants on those counts. While the trial court struggled on the record to grasp the meaning of the acceptance clause, it ultimately ruled that the acceptance clause constituted a conditional acceptance, i.e., acceptance of the purchase agreement was conditioned on the seller reviewing and approving the land contract, which did not occur. Given the failure of the condition to occur, there was no binding agreement to enforce according to the trial court. Effectively, the trial court ruled that, regardless of the reason for not approving the land contract and going forward with the sale, there was no contract formation as a result of the failure to approve the land contract. Plaintiffs' motion for reconsideration was denied. Subsequently, all defendants filed motions for summary disposition under MCR 2.116(C)(8) and (10) with respect to all of the remaining counts in plaintiffs' complaint. They primarily argued that the remaining counts were all grounded on the claim that the purchase agreement was binding and that given the trial court's ruling that there was no binding contract, the counts all failed. The trial court granted both motions for summary disposition, agreeing with defendants that its earlier ruling effectively rendered the remaining claims legally unsustainable.[3]

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[2] In the alternative, the trustee and Stewart argued that if the trial court found the acceptance clause to be ambiguous, there was documentary evidence showing that Stewart and plaintiffs had entirely different views as to the binding nature of the purchase agreement. In that circumstance, they argued, there would exist a genuine issue of material fact, and plaintiffs would therefore not be entitled to summary disposition.

[3] With respect to the trust/trustee and Stewart's cross-claim against CBSR and the realtor, they stipulated to the dismissal of the cross-claim, subject to the summary disposition ruling being affirmed on appeal should one be taken.

We review de novo a trial court's ruling on a motion for summary disposition. *Elba Twp v Gratiot Co Drain Comm'r*, 493 Mich 265, 277; 831 NW2d 204 (2013).[4] "We review a trial court's ruling on a motion for reconsideration for an abuse of discretion." *Corporan v Henton*, 282 Mich App 599, 605; 766 NW2d 903 (2009). "[Q]uestions involving the proper interpretation of a contract or the legal effect of a contractual clause are . . . reviewed de novo." *Rory v Continental Ins Co*, 473 Mich 457, 464; 703 NW2d 23 (2005). Similarly, the issue whether a contract exists in the first place is subject to de novo review. *Kloian v Domino's Pizza, LLC*, 273 Mich App 449, 452; 733 NW2d 766 (2006).

The requisite elements of a valid contract are (1) parties competent to enter into a contract, (2) a proper subject matter, (3) legal consideration, (4) mutuality of agreement, and (5) mutuality of obligation. *Thomas v Leja*, 187 Mich App 418, 422; 468 NW2d 58 (1991). With respect to contract formation, it requires an offer, an acceptance that is in strict conformance with the offer, and mutual assent or a meeting of the minds on all of the essential terms. *Kloian*, 273 Mich App at 452-453. If a "purported acceptance includes conditions or differing terms, it is not

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[4] MCR 2.116(C)(8) provides for summary disposition when a complaining party fails "to state a claim on which relief can be granted." A motion for summary disposition under MCR 2.116(C)(8) tests the legal sufficiency of a complaint. *Beaudrie v Henderson*, 465 Mich 124, 129; 631 NW2d 308 (2001). The trial court may only consider the pleadings in rendering its decision. *Id.* All factual allegations in the complaint must be accepted as true. *Dolan v Continental Airlines / Continental Express*, 454 Mich 373, 380-381; 563 NW2d 23 (1997). "The motion should be granted if no factual development could possibly justify recovery." *Beaudrie*, 465 Mich at 130. With respect to the well-established principles governing the analysis of a motion for summary disposition brought pursuant to MCR 2.116(C)(10), this Court in *Pioneer State Mut Ins Co v Dells*, 301 Mich App 368, 377; 836 NW2d 257 (2013), stated:

> In general, MCR 2.116(C)(10) provides for summary disposition when there is no genuine issue regarding any material fact and the moving party is entitled to judgment or partial judgment as a matter of law. A motion brought under MCR 2.116(C)(10) tests the factual support for a party's claim. A trial court may grant a motion for summary disposition under MCR 2.116(C)(10) if the pleadings, affidavits, and other documentary evidence, when viewed in a light most favorable to the nonmovant, show that there is no genuine issue with respect to any material fact. A genuine issue of material fact exists when the record, giving the benefit of reasonable doubt to the opposing party, leaves open an issue upon which reasonable minds might differ. The trial court is not permitted to assess credibility, weigh the evidence, or resolve factual disputes, and if material evidence conflicts, it is not appropriate to grant a motion for summary disposition under MCR 2.116(C)(10). A court may only consider substantively admissible evidence actually proffered relative to a motion for summary disposition under MCR 2.116(C)(10). [Citations and quotation marks omitted.]

a valid acceptance – it is a counteroffer and will not bind the parties." *Huntington Nat'l Bank v Daniel J Aronoff Living Trust*, 305 Mich App 496, 508; 853 NW2d 481 (2014).

In *Burkhardt v Bailey*, 260 Mich App 636, 656-657; 680 NW2d 453 (2004), this Court set forth the core principles of contract interpretation:

> [The] unilateral subjective intent of one party cannot control the terms of a contract. It is beyond doubt that the actual mental processes of the contracting parties are wholly irrelevant to the construction of contractual terms. Rather, the law presumes that the parties understand the import of a written contract and had the intention manifested by its terms.
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> The main goal of contract interpretation generally is to enforce the parties' intent. But when the language of a document is clear and unambiguous, interpretation is limited to the actual words used, and parol evidence is inadmissible to prove a different intent. An unambiguous contract must be enforced according to its terms. The judiciary may not rewrite contracts on the basis of discerned "reasonable expectations" of the parties because to do so is contrary to the bedrock principle of American contract law that parties are free to contract as they see fit, and the courts are to enforce the agreement as written absent some highly unusual circumstance, such as a contract in violation of law or public policy. [Citations and quotation marks omitted.]

A contract is ambiguous if its provisions are capable of conflicting interpretations. *Klapp v United Ins Group Agency, Inc*, 468 Mich 459, 467; 663 NW2d 447 (2003). If contract language is ambiguous, "the ambiguous language presents a question of fact to be decided by" the trier of fact. *Cole v Auto-Owners Ins Co,* 272 Mich App 50, 53; 723 NW2d 922 (2006). Extrinsic evidence is admissible to determine the intent of the parties when a contract is ambiguous. *Shay v Aldrich*, 487 Mich 648, 667; 790 NW2d 629 (2010). An ambiguity can be either latent or patent, and while the parol-evidence rule bars use of extrinsic evidence to identify a patent ambiguity because such an ambiguity appears on the face of a document, extrinsic evidence is admissible to show the existence of a latent ambiguity. *Id.*

On appeal, the gist of plaintiffs' argument is that the trial court erred in denying their motion for partial summary disposition and in granting summary disposition in favor of defendants, given that the court misconstrued the acceptance clause, which clause resulted in a binding and enforceable contract. Defendants contend that the trial court properly interpreted the acceptance clause. We initially take note of the character of and distinctions between real estate purchase agreements and land contracts. In *Zurcher v Herveat*, 238 Mich App 267, 291; 605 NW2d 329 (1999), this Court explained:

> We . . . note that there is possibility for confusion between a contract for the sale of land and a "land contract." A contract for the sale of land is, quite simply, a purchase agreement such as the one at issue in this matter. The term "land contract" is commonly used in Michigan as particularly referring to "agreements for the sale of an interest in real estate in which the purchase price is to be paid in installments (other than an earnest money deposit and a lump-sum payment at closing) and no promissory note or mortgage is involved between the

> seller and the buyer." 1 Cameron, Michigan Real Property Law (2d ed.), § 16.1, p. 582. A land contract is therefore an executory contract in which legal title remains in the seller/vendor until the buyer/vendee performs all the obligations of the contract while equitable title passes to the buyer/vendee upon proper execution of the contract. While in modern practice purchase agreements and land contracts are often not the same document, in earlier times they often were. . . . .

We conclude that the acceptance clause created a condition precedent. The more difficult issue regards defining the nature or parameters of the condition precedent. In *Harbor Park Market, Inc v Gronda*, 277 Mich App 126, 131-132; 743 NW2d 585 (2007), this Court discussed conditions precedent, observing:

> A condition precedent . . . is a fact or event that the parties intend must take place before there is a right to performance. If the condition is not satisfied, there is no cause of action for a failure to perform the contract. However, . . . promisors . . . cannot avoid liability on [a] contract for the failure of a condition precedent where they caused the failure of the condition. As the Supreme Court has stated, when a contract contains a condition precedent, there is an implied agreement that the promisor will place no obstacle in the way of the happening of such event. Where a party prevents the occurrence of a condition, the party, in effect, waives the performance of the condition. Hence, the performance of a condition precedent is discharged or excused, and the conditional promise made an absolute one. [Citations, quotation marks, and ellipses omitted.]

In 1 Cameron, *Michigan Real Property Law* (3d ed), Real Estate Sale Contracts, § 15.45, pp 553-554, the author discussed conditions precedent in the context of real estate transactions, stating:

> Many real estate sale contracts contain conditions precedent that must be met before either the buyer or the seller has an obligation to proceed. A condition precedent is distinguished from a promise in that it creates no right or duty in itself but is merely a limiting or modifying factor. Rezoning, the availability of financing, tax abatement, and the ability of one party to sell or purchase other real estate are often the subject of common conditions precedent in real estate sale contracts. . . . Once a condition has been fulfilled, the contract ceases to be conditional. [Citations omitted.]

Here, a conditional contract was formed when Stewart, or the realtor as her agent, stated in the purchase agreement, "Offer accepted. Sellers to review and approve land contract prior to closing."[5] The condition or event that had to occur before a duty to perform arose was the

[5] We reject the suggestion that the acceptance clause constituted a counteroffer, considering that it fully accepted and did not conflict with the language and terms in the purchase agreement; rather, the acceptance clause recognized and dealt with a future event that would need to take place for the transaction to be fully consummated, i.e., execution of the land contract.

review and approval of the land contract. The land contract was reviewed, but no approval was forthcoming. Therefore, at first glance, it would appear that the condition precedent contained in the acceptance clause was not satisfied, thereby excusing any duty to perform under the purchase agreement. But the words in the acceptance clause must be viewed carefully, in context, and in light of the nature of the particular transaction. The statement "offer accepted" followed by a period (punctuation mark) clearly reflected an acceptance of and agreement to all of the terms in the purchase agreement; they were not subject to renegotiation unless both parties wished to do so. Because the purchase agreement did not make reference to any particular land contract form,[6] and because a land contract will generally address details that are not ordinarily spelled out in an underlying purchase agreement, e.g., taxes and insurance, property maintenance, and the ability to convey or mortgage, review and approval of the land contract simply meant that Stewart or the trust had the right to approve or disapprove of terms in the land contract that were not addressed in the purchase agreement.[7] For example, if the proposed land contract had allowed plaintiffs to modify the property, Stewart or the trust could have rightfully disapproved of the land contract, at which point plaintiffs would have had the opportunity to make a change satisfactory to the seller, or the obligation to perform would have been terminated for failure of the condition precedent.

The precise wording of the acceptance clause not only gave Stewart or the trust the right to review the land contract, it gave rise to *an obligation* to review it ("Sellers to review"). And the only conceivable purpose of reviewing the land contract, in the context of approving or disapproving it, would be to determine whether there were provisions that were unsatisfactory or inconsistent with the already-accepted terms in the purchase agreement. If the seller had the unfettered discretion to walk away from the conditional contract by disapproving of the land contract for no reason at all, or to accept a better deal, or because of anger at the purchasers,[8] and then simply claim that the condition did not occur (no approval), the word "review" in the acceptance clause would lose all meaning. Refusing to approve the land contract for the reason that, for example, there was anger about Patrick's behavior, would have nothing whatsoever to do with the "review" of the land contract. Similarly, "review" of the land contract would have nothing to do with a refusal to approve said contract based on the existence of a better offer being made. While Stewart or the trust had the right to cause the failure of the condition precedent on the basis that there was unacceptable language in the land contract upon review, outside the terms incorporated from the purchase agreement, there was no right to cause the failure of the condition precedent for whatever whimsical reason unrelated to reviewing the terms of the land contract. The approval or disapproval of the land contract had to be related to

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[6] There are standard forms, as indicated by the realtor in her testimony.

[7] Indeed, in the family attorney's deposition, he testified consistently with our construction of the acceptance clause and even stated that he informed Stewart and the others of this view. The realtor testified that she held the same belief.

[8] There was evidence that two offers, which could reasonably be considered superior to plaintiffs' offer, were submitted after the purchase agreement was executed. Also, there was evidence that Stewart no longer wished to proceed based on her distain, deservedly or not, of Patrick.

the examination and review of the proposed land contract. And Stewart and the trust had to proceed in good faith with respect to the review and condition precedent.

According to the letter drafted by the family attorney, the trust refused to proceed because of insurance-procurement issues, because the down payment was too low, because of the so-called interest-only monthly installment payments, and, most importantly, because Stewart purportedly lacked the capacity to bind the trust. The complaints about the down payment and the amount of the monthly installments are irrelevant, as Stewart had already agreed to those terms and amounts. The issues concerning insurance and Stewart's capacity to bind the trust were not determined below and fall outside the realm of this appeal, but of course, defendants are free to raise those arguments and any other contract defenses on remand. Stewart and the trust did not seek to avoid the purchase agreement on the basis that the land contract contained unacceptable terms aside from those already addressed and agreed to in the purchase agreement. Indeed, the documentary evidence established without dispute that the demands voiced by Stewart and her husband to the realtor as to what the land contract had to include regarding such matters as taxes and insurance were satisfied by the language in the proposed land contract.

In sum, the trial court erred in its construction of the acceptance clause contained in the purchase agreement; therefore, the court erred in granting summary disposition in favor of defendants on all of plaintiffs' claims, except as to the breach of contract and specific performance counts relative to CBSR and the realtor.[9] To be clear, we are not granting summary disposition in favor of plaintiffs on any of their claims, given that there are other defenses and arguments that need to be addressed and resolved.

Plaintiffs also argue that the trial court erred in summarily dismissing their claims of civil conspiracy, breach of fiduciary duties, and tortious interference with a business expectancy or relationship, given that the lack of a binding contract is wholly irrelevant to those particular claims.[10] In light of our holding, it is unnecessary to reach and resolve plaintiffs' arguments on this issue, and we decline to do so.

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[9] The trial court accepted without dispute CBSR and the realtor's argument that those claims did not pertain to them.

[10] "A civil conspiracy is a combination of two or more persons, by some concerted action, to accomplish a criminal or unlawful purpose, or to accomplish a lawful purpose by criminal or unlawful means." *Admiral Ins Co v Columbia Cas Ins Co*, 194 Mich App 300, 313; 486 NW2d 351 (1992). Damages are recoverable for losses caused by a breach of a fiduciary's duties. *Vicencio, MD v Ramirez, MD, PC*, 211 Mich App 501, 508; 536 NW2d 280 (1995). "The elements of tortious interference with a business relationship or expectancy are the existence of a valid business relationship or expectancy, knowledge of the relationship or expectancy on the part of the defendant, an intentional interference by the defendant inducing or causing a breach or termination of the relationship or expectancy, and resultant damage to the plaintiff." *Cedroni Assoc, Inc v Tomblinson, Harburn Assoc, Architects & Planners, Inc*, 492 Mich 40, 45; 821 NW2d 1 (2012) (citation and quotation marks omitted). Generally speaking, none of these causes of action specifically require the existence of an underlying binding contract.

Reversed and remanded for proceedings consistent with this opinion. We do not retain jurisdiction. Having fully prevailed on appeal, plaintiffs are awarded taxable costs.

/s/ Michael J. Riordan
/s/ William B. Murphy
/s/ Mark T. Boonstra